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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 705

DONALD PETER VAN HOOK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit, which court affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding Petitioner guilty of violation of the Universal Military Training and Service Act (Sec. 462, Title 50, App. U.S.C.), and sentencing him into the custody of the Attorney General for a period of three years.

OPINION BELOW.

The opinion of the Court of Appeals of November 22, 1960, No. 12967 is not yet reported. It appears as Appendix A to this petition.

JURISDICTION.

The finding and judgment of the Trial Court was entered without opinion on December 14, 1959, (18 U.S.C. 3231; 62 Stat. 826). The decision of the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court (28 U.S.C. 1291; 72 Stat. 348). A petition for rehearing *en banc* was filed on the 6th day of December, 1960. This was denied by the United States Court of Appeals as was the rehearing, on the 10th day of January, 1961. This petition for a Writ of Certiorari is timely filed.

The statutory provision, believed to confer jurisdiction to review the judgment in question by Writ of Certiorari, is 28 U.S.C. 1254(1); 62 Stat. 928.

QUESTIONS PRESENTED.

I.

When the file of a draftee is ordered to be closed by the State Director of Selective Service, who also ordered the Local Board that the draftee be reprocessed, does the failure of the Local Board to reclassify him pursuant to applicable regulations, make the classification of the draftee void?

II.

When the Local Board finds that the draftee is sincere and honest in his contention that he has religious objection to serving as a combatant or as a non-combatant, in the armed forces, nevertheless the Board classifies him as a conscientious objector to combatant service only, for the reason that it refuses to classify anyone as a conscientious objector to all military services, will the illegal action of the local board be cured by the *de novo* action of the Appeal Board?

III.

When the Appeal Board finds that it is in disagreement with the conclusions of the Local Board set forth in its memoranda of actions as to the draftee, and when the Appeal Board indicates that it will ignore all such conclusions, and when the Appeal Board on the basis of draftee's file classifies him exactly as did the Board, does such action by the Appeal Board present a basis in fact for the classification?

(a) Is it immaterial, as the Court of Appeals held, whether the Local Board applies proper or improper standards to the draftee's classification in view of the Appeal Board's action *de novo*?

IV.

Is the *corpus delicti* established by the admission—over objection—into evidence of a letter from the Commanding Officer of the induction center who concludes therein that petitioner "refused induction"?

(a) Is such a letter admissible as official document under 28 U.S.C. 1733(a)?

(b) Is such a letter in evidence sufficient, to admit, over objection, the testimony of an agent of the FBI, to the effect that petitioner stated, many months afterwards, "that he refused to be inducted"?

V.

When the Transcript of Evidence discloses that the Trial Judge failed, and in fact refused, to read the documents from the Selective Service file introduced into evidence, is there compliance with the holding of this Court

that when a draftee establishes *prima facie* his right to the exemption status, that the court must search the record to find a basis in fact for the classification given, contrary to the *prima facie* claim of the draftee?

VI.

When the government's attorney introduces into evidence certain documents from the Selective Service file and states that a document is a letter from or to the Local Board; that another is from or to the Illinois Appeal Board or for or to the draftee, (App. D),[1] then are such descriptions, as the Circuit Court of Appeals held, that which "alone could have provided adequate information for the trial court's limited scope of review: ascertaining whether there was a basis in fact for the classification given"?

VII.

When the decision of the Court of Appeals is silent as to the presence or absence of basis in fact for the classification given contrary to the *prima facie* established claim of a conscientious objector, is there a conflict between such decision and the holdings of the various Court of Appeals and the repeated holdings of this Court as to the necessity of basis in fact for the classification given?

VIII.

When the Trial Court twice pronounces a guilty finding, and twice imposes sentence without giving the defendant an opportunity of stating his reasons why sentence should not be pronounced, is such omission a violation of Rule 32(a) of the Federal Rules of Criminal Procedure that it requires reversal?

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[1] Appendix D is found on pages 1a to 4a of Appendix A in the Appellant's Petition For Rehearing before the United States Court of Appeals and certified to this Court.

IX.

Do the procedural and substantive violations of the Due Process accumulate so that a reversal of the conviction here is required?

STATUTES AND REGULATIONS INVOLVED.

(Because of their length, they appear more conveniently in Appendix B.)

(1) 28 U.S.C. 1733 (a); 62 Stat. 946.

(2) 50 U.S.C. 462; 62 Stat. 622.

(3) Rule 1623.4 of Selective Service Regulations.

(4) Rule 1625.11 of Selective Service Regulations.

(5) Rule 1625.12 of Selective Service Regulations.

(6) 18 U.S.C. Rule 32(a) (Rules of Criminal Procedure).

STATEMENT OF THE CASE.

Petitioner was indicted for violation of Sec. 462, Title 50, Appendix U.S.C. (Universal Service and Training Act) and was charged with having refused to obey an order of induction issued from Selective Service Board 177 of Sullivan, Illinois. He pleaded not guilty and waived trial by jury. Evidence was heard and the Trial Court entered a finding of guilty and committed the defendant into the custody of the Attorney General for a period of three years, (page 1 of the Appendix filed before the United States Court of Appeals for the Seventh Circuit, hereinafter referred to as (App., p. 1)). Petitioner filed his appeal claiming error of the Trial Court arising out of rulings on evidence (erroneous admissions and erroneous exclusions); failure of the Trial Court to find certain

issues as a matter of fact and of law and prejudicial conduct of the trial judge. The Court of Appeals affirmed (App. A).

During the trial, the government identified and entered into evidence certain documents from petitioner's Selective Service File. Petitioner objected to the introduction of all documents covering the period prior to the time when the Director of Selective Service (State of Illinois) instructed his Local Board to reprocess his file (App. pp. 8 and 9). Petitioner particularly objected to such documents because of the failure of the Local Board to comply with the mandatory provisions of Selective Service regulation 1625.11 pertaining to Classification Anew and processing thereunder (App. p. 10 and App. B).

The government introduced into evidence its Exhibit B-50, a Memorandum of Action of a Local Board Meeting pertaining to petitioner. Pursuant to this memo, petitioner stated to the Board that he could not accept 1-A-O classification, (available for non-combatant service) given him because it is in violation of his religious training and belief on the basis of which he requested the classification of 1-O (objector both to combatant and non-combatant service). The Board answered that since 1-O does not count towards the draft quota of the county they in fairness do not give 1-O classification to anyone; they do not ask petitioner to kill or to carry a gun; they only ask him that he join the armed forces as 1-A-O; "they certainly do recognize his sincerity in his belief and his church. . . . We have studied all the conscientious objector files of the Board . . . and we prayed to God for understanding and guidance in the classification thereof. We truly believe that we were guided and we took a secret ballot. The

ballot was of a unanimous vote of all Board members leading to the classification of 1-A-O for all conscientious objectors of Moultrie County". (That is petitioner's home county and headquarters of Local 177.) "We do not have a registrant classified 1-O in our files today."

Petitioner claimed before the Board that by denying him 1-O classification, the Board denied him the freedom of his religion. The Board, as the memo states, replied "that they wanted to be fair and believed in his sincerity and recognized his church and so recognized these facts under the definition of Class 1-A-O". One of the Board members told petitioner that he had a son who was killed in World War II; he was a conscientious objector and a member of a church in good faith and he believed in Jesus, the same as petitioner does. This Board member's son "thought it was his duty to serve God and his country, and he filled his obligation. We feel that you should so the same". (App. C,[2] p. 22.)

Petitioner requested that his file be forwarded to the State Appeal Board appealing from his classification as 1-A-O.

The State Board affirmed the classification of 1-A-O and justified it by inserting a statement, Exhibit B-59, (App. C, p. 30) into petitioner's file. Petitioner objected to government's Exhibit B-59 as not proper under the regulation and further that it does not show basis in fact for retaining him in 1-A-O. Government's Exhibit B-59 was entered in evidence and contains the following:

> "The Appeal Board desires to set forth the following . . .
>
> "We find we are in disagreement with certain conclusions of the local board as set forth in the memo-

[2] App. C is the Exhibit Volume submitted by the Government to the United States Court of Appeals, and certified to this Court.

randum of the actions taken by the local board in classifying this registrant. For this reason we are entirely ignoring all of the local board's conclusions as stated in their memoranda. . .

". . . we have independently reached the conclusion that Registrant Van Hook is eligible for Class 1-A-O, as a conscientious objector to combatant training and service as defined by the Act of Congress, but that he is not eligible for Class 1-O as a conscientious objector to both combatant and noncombatant service as defined by the Congress."

The government offered for the purpose of establishing a *corpus delicti* Exhibit B-74, a letter from petitioner's induction center dated 30 October 1957. Petitioner objected to this Exhibit on the ground that the signer is not available for cross-examination. (App. pp. 10-11.) Exhibit B-74 was admitted into evidence under Section 1733 of Title 28. It is signed by one "H. Schuttler, Capt. AGC, Deputy Co. for Induction" and is addressed to the U. S. District Attorney in Chicago and it is stated therein:

"In compliance with Paragraph 27b, Special Regulations 615-180-1, Department of the Army, dated 5 November 1951, the name and circumstances surrounding the refusal of Van Hook, Donald Peter, 1008 S. Hamilton St., Sullivan, Illinois, Selective Service Number 11 177 33 32, who refused to submit to introduction into the Armed Forces of the United States is hereby submitted.

". . . Mr. Van Hook refused induction on the grounds that he is a 'Conscientious Objector' and stated his religious belief 'Church of Jesus Christ' will not permit him to be inducted. Mr. Van Hook was asked to make a signed statement in his own hand writing confirming his refusal to submit to induction which he refused to do. It was explained to the registrant that his refusal to submit to induction would constitute

a felony under the provisions of Selective Service Regulations, and was informed that a conviction of such a nature would subject him to punishment of either five (5) years of imprisonment and a fine of not more than $10,000 or both. Capt. Walter H. Schuttler, AGC, Capt. Victor C. Lien, Inf. and Sgt. Jack Paton, RA 36112640 were witnesses to the registrant's refusal to submit to induction." (App. C, p. 31)

The government offered the testimony of Lt. Tapscott, deputy commanding officer of the induction station. He identified government's Exhibits C1 to C5 which were offered in evidence by the government and admitted over objection of petitioner (App. pp. 11-15), even though there was no showing that these documents were prepared in the regular course of business by the people whose name appear attached thereto. (App. pp. 12-14.)

Government called as its witness Berneking, an employee of the FBI in Chicago, who testified to a conversation with petitioner on February 24, 1958. Petitioner objected to further testimony by this witness on the ground that there was no proof of *corpus delicti*; that this witness ought not be permitted to testify as to a purported admission by petitioner some five months after the alleged act was committed on October 3, 1957. His objections were overruled (App. p. 26). The crux of the testimony was that petitioner told him that he "appeared for induction on that date. However, he did not submit to induction on the morning of October 3, 1957. . . . (App. p. 17)". . . Petitioner moved that this witness's testimony be stricken on the ground that it does not prove the charge against him since the only testimony was that he admitted that he "did not submit to induction". The motion was overruled by the Trial Court. (App. p. 17.)

The government rested its case and petitioner moved the court for a judgment of acquittal on the ground that

there was no proof whatever that he did anything in violation of the section referred to in the indictment; that there was no proof of the *corpus delicti*; that there was no proof whatever that he was the man who refused induction. (App. p. 17.) The motion for an order of acquittal was overruled, (App. p. 19).

Thereupon, the petitioner moved for a judgment of acquittal on the ground that there was nothing in the record which shows that there was basis in fact for not granting the classification of 1-O as requested by him. In support of his motion petitioner relied particularly on government's Exhibit B-50 entitled "Memorandum of Information Received at Board Meeting" (App. C, pp. 21-23.)

The government referred to Exhibit B-10 (App. C, pp. 1-20), submitted by Miss Leah Harshman, pastor of the church to which defendant belongs, the government claimed that this exhibit proves that the church maintains a business known as Community Industries; that it takes government contracts to produce candies that are put into rations that are served to men in the fighting fronts; it makes uniforms for nurses (App., p. 23), and such is basis in fact. The government's attorney admitted that the draft board members' remark in Exhibit B-50 that they have to furnish people to the Army and are not getting credit for 1-O classifications was prejudicial; however, since the Appeal Board reviewed the file and in accordance with Exhibit B-59 they disregarded the draft board's conclusions, there is no error (App. p. 23). Thereupon petitioner's motion for a judgment of acquittal was overruled.

Petitioner called, pursuant to subpoena, two members of his Draft Board and requested that since they are likely to be hostile, they be called as court witnesses. The government objected to their being so called, and further objected

against their testimony on the ground that the Appeal Board gave petitioner a trial *de novo* and whatever views the members of the Local Board may have had they are not material as far as the present inquiry is concerned (App. p. 25). The objection was sustained and the Draft Board members were not made the court's witnesses. (App. p. 26.)

Thereupon, Board member Bone was called as petitioner's witness and was asked whether he recalled a conversation that he and other Draft Board members had concerning petitioner's request for a 1-O classification. The government objected to the answer and the same was sustained. (App. pp. 27-28). The Draft Board member then was asked whether his Board ever classified anyone as 1-O. There was an objection by the government and the objection was sustained, (App. p. 28). Petitioner then inquired of the Trial Court whether he is permitted to obtain an answer from the Draft Board member to his question, "Was there a fair hearing granted by these members of the Draft Board; in particular, to this young defendant?", if he is not permitted to so inquire then he will make an offer of proof. Thereupon the Trial Court stated that he "better make an offer of proof". (App. pp. 28-29)

The offer was that if Draft Board members Bone and Wood, who were among those who passed upon the classification of petitioner, were to testify they would admit that their Draft Board at no time granted a 1-O to any person, because a 1-O classification is not credited towards the Board's draft quota; that petitioner was not classified 1-O, not because they did not believe in his honesty, integrity and sincerity but to the contrary, because the Board believes that no man should be granted a 1-O classification; and further because the Board members can recognize conscientious objections only to non-combatant service,

and not to both combatant and non-combatant service. Whereupon a government objection to that offer of proof was sustained (App. 30.)

Petitioner offered certain documents from his Selective Service file which were admitted and thereupon he rested his case and at this point the following colloquy took place between court and counsel:

"The Court: Do you have anything further?

Mr. Kaufman: To present, your Honor?

The Court: Yes.

Mr. Kaufman: No, I do not.

The Court: The Government has concluded its case and the defendant has rested?

Mr. Kaufman: Yes, sir.

Mr. Heisler: Yes, your Honor.

Mr. Kaufman: The Government has no rebuttal.

The Court: There will be a finding of guilty, remanded to the custody of the Attorney General for a period of three years.

Mr. Heisler: If your Honor please, would the Court be interested in hearing any closing argument, final argument on our behalf?

The Court: I thought you had concluded.

Mr. Heisler: Yes, but I thought I would like to make a closing argument.

The Court: Then we will hold up entering the order and listen to your argument.

Mr. Heisler: All right. As a matter of fact, I thought when we submitted the documents in evidence probably the Court wanted to look over them. May I be permitted to point out to the Court certain things?

The Court: You make your regular closing argument, he makes his, and then you answer.

Mr. Heisler: Fine, thank you."

Thereupon, Mr. Kaufman presented closing argument on behalf of the Government, and Mr. Heisler on behalf

of petitioner. Mr. Kaufman presented rebuttal on behalf of the Government.

> "The Court: Does that conclude the arguments, now?
>
> Mr. Heisler: Yes, your Honor.
>
> Mr. Kaufman: Yes, sir.
>
> The Court: Well, we will now make the finding that the defendant is guilty and he will be remanded to the custody of the Attorney General for a period of three years. I think that you are going to appeal this?
>
> Mr. Heisler: Yes, sir." (App. pp. 31-32.)

Petitioner moved for a New Trial on the grounds *inter alia*, that the court erred when, over his objection, it admitted into evidence documents antedating the order of the State Director of Selective Service for complete reprocessing of his files. Said exhibits were immaterial and prejudicial to petitioner. The court erred when, over his objection, admitted Government's Exhibit B-59 which is not part of his Selective Service files; that the same is self-serving and it was introduced into the files extrajudicially; that the court erred when, over his objection, it admitted Government's Exhibit B-74, even though the same was not properly identified nor authenticated as a government document and that the same was wholly insufficient to prove a *corpus delicti;* that the court erred, when over his objection, it admitted the testimony of FBI Agent Berneking, even though such testimony was improper in absence of proof of a *corpus delicti*; the court erred when it failed to review the documents in evidence, and failed to search the record for basis in fact for the refusal of petitioner's request for classification as a conscientious objector opposed to both combatant and non-combatant service; the court improperly refused to admit the proffered testimony of two Draft Board members, which testimony would have shown that the hearing

afforded by the Board was not in compliance with the law nor with the rules and regulations of Selective Service, and that the classification given to him was capricious, based on misinterpretation of the law and on bias and prejudice and that therefore the order to report for induction was without the Board's jurisdiction; the court erred in denying defendant's Motion for a Judgment of Acquittal and the judgment of the court is due to its bias and prejudice. (App. pp. 34-36.) Motion for a new trial was overruled by the Trial court. (App. 36.)

Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, (App. p. 37), which court affirmed the judgment of the trial court, (App. A).

REASONS FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING SAME.

Petitioner's case raises important questions of constitutional and statutory law as well as an interpretation of the rules of administrative agencies which questions have not been, but should be settled by this Court. Other of these questions have been decided by the various Circuit Courts of Appeals, and the instant decision of the Circuit Court of Appeals of the Seventh Circuit is in conflict not only with certain decisions of this Court and of other Circuits, but also with cases decided by the self same Seventh Circuit.

1. This Court has never decided the important question as to whether a draftee, such as petitioner, whose file was ordered by the Director of Selective Service to be returned to the Draft Board for "Complete Reprocessing and Classification Anew" is adversely effected by the Board's failure to comply with such an order and with the mandatory provisions of Selective Service regulations.

2. This Court has never decided the important question as to whether a draftee, as petitioner here, was deprived of due process of law when his Draft Board recognized the sincerity and honesty of his claim as a conscientious objector to all service, nevertheless gave him a classification as an objector to combatant service only, because the Appeal Board allegedly reviewed the classification *de novo*.

3. While this Court and some of the Circuits have held that a draftee, as petitioner, who establishes *prima facie* his claim to be classified as a conscientious objector cannot be denied such claim by the State or by the National Appeal Board without giving a basis in fact for such denial, the instant decision of the Court of Appeals for the Seventh Circuit is contrary to such decisions.

4. The present decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decision of other Circuit Courts, and this Court has never decided the question whether the government can prove the *corpus deliciti* (without the oral testimony of a competent witness) by submitting a letter written by the Commanding Officer of the Induction Center to the United States District Attorney in which he stated that a draftee, as petitioner here, was ordered to report for induction and he "refused induction on the grounds that he is a 'Conscientious Objector' and stated his religious belief "Church of Jesus Christ will not permit him to be inducted".

(a) Is such a letter admissible as proof of *corpus delicti*, pursuant to Title 28, U.S.C. 1733 (a), as held by the Court of Appeals for the Seventh Circuit.

(b) Is the letter of the Commanding Officer of the Induction Center, as the Court of Appeals held, such in-

dependent evidence which establishes the *corpus delicti*, and that therefore the alleged admission of petitioner made to the FBI agent some five months after the alleged act, admissible?

5. The decision of the Court of Appeals for the Seventh Circuit is in conflict with decisions of other Circuits, when it held that the bare description by the government attorney of certain documents from the draftee's file "alone could have provided adequate information for the Trial Court's limited scope of review: ascertaining whether there was a basis in fact for the classification given." The present decision of the Court of Appeals for the Seventh Circuit is in conflict with this Court's decision which requires that the Trial Court search the record for basis in fact for the denial of petitioner's claim for a certain classification, the justification for which he established *prima facie*.

6. This Court has never decided, though some of the Courts of Appeal have, whether the Trial Court's failure in a criminal case to give an opportunity to the defendant, as petitioner here, to state the reasons, if any he has, why sentence should not be pronounced, is such a failure to comply with the Federal Rule of Criminal Procedure which requires reversal. The holding of the Court of Appeals for the Seventh Circuit in the negative, is in conflict with the decisions not only of other Circuits but with the holding of the self same Seventh Circuit in other cases.

7. This Court never decided whether the repeated denial of procedural and substantive due process to a defendant in a criminal case, as the petitioner here, accumulates to such an extent that a reversal of the Trial Court's judgment is required. The holding of the Court of Appeals for the Seventh Circuit in the instant case in the negative, is in conflict with various decisions of the various other Circuit Courts.

ARGUMENT.

PRELIMINARY STATEMENT.

In May, 1955, the Illinois Deputy State Director of Selective Service returned petitioner's file to Board No. 177, "'for complete reprocessing by your local board." The reason for such action was

> "that in view of recent Court decisions the United States attorney for the Northern District of Illinois advised us that he is closing his file in the case. Therefore, this notification will serve as sufficient authority for your Local Board to show final disposition on the SSS Form 302 report for the next quarter. We are likewise closing our file in this matter." (App. pp. 8-9)

During the trial the government offered from petitioner's file Exhibits B to B-36, all antedating the above letter of the State Director. Petitioner objected to the admission of such documents as prejudicial to him because they show his prior refusal of induction. The government indicated to the Court that "this is not the violation that we are trying the defendant on. There is a subsequent rehash of the matter and a refusal later" (App. pp. 7-8). Petitioner further objected on the ground that the old documents were no substitutes for the new classification mandatorily required by 1625.11 of Selective Service Regulations (App. 10 and App. B). That regulation entitled "Classification Considered Anew When Reopened" provides as follows:

> "When the local Board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. . . ."

The objection was further based on Regulations 1625.12 and 1623.4 (App. p. 10, App. B), the first one states:

> "When the local Board reopens the registrant's classification, it shall, as soon as practicable, after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of Section 1623.4 of this chapter."

Regulation 1623.4 states that the Draft Board:

> ". . . shall mail a notice thereof on a Notice of Classification (SSS Form 111) to every person who has on file any written request for the current deferment of the registrant. . . ."

Petitioner additionally claimed that Regulations 1625.11, 1625.12 and 1623.4, if complied with by his Draft Board, would have given him the opportunity to supply such additional information as bears upon his claim as religious objector to military service and that the non-compliance by the Draft Board deprived him of due process of law.

Petitioner objected to the introduction into evidence from his Selective Service file of Exhibit B-59, (App. C, p. 30) on the ground that the same is in violation of Selective Service Regulations and on the ground that the same was "made up" for the purpose of concocting a "basis in fact" for the denial of his claim as a conscientious objector and it was further "made up" for the purpose of overcoming the obvious illegal conduct of the Draft Board as it appears from Exhibit B-50 (App. C, pp. 21-23). The admission into evidence of Exhibit B-59 was in violation of due process.

Petitioner objected to the admission into evidence of Exhibit B-74 (App. C, p. 31), a letter from the Deputy

Commanding Officer of the induction center, and which letter, in the absence of the writer thereof, was admitted as proof of *corpus delicti* even though it stated nothing more than that the petitioner "refused induction on the ground that he is a conscientious objector". Admission of Exhibit B-74 was in violation of due process.

Petitioner objected to the admission into evidence the testimony of FBI Agent Berneking (App. pp. 15-17) on the ground that it referred to an alleged admission by petitioner and that such was not proper evidence in absence of proof of *corpus delicti*. The Trial Court, permitting Agent Berneking to testify, violated petitioner's right to due process of law.

Petitioner, after the Court cut off the presentation of the evidence proffered through Draft Board members Bone and Wood (App. pp. 26 to 30), offered proof that these Draft Board members would testify that while they believed that petitioner was honest and sincere in his claim as a conscientious objector to all military service, nevertheless, they granted him a classification as an objector to combatant service only, because they would not recognize conscientious objection to all military service but only to non-combatant service. The offer of proof was rejected (App. p. 30), and such rejection was contrary to due process.

After the petitioner presented his evidence and rested and after the government stated that it had no rebuttal, the Court stated "There will be a finding of guilty, remanded to the custody of the Attorney General for a period of three years". (App. p. 31.) When petitioner's counsel requested the Court's indulgence in hearing closing argument, the Court indulged him by stating:

> "Then we will hold up entering the order and listen to your argument."

After closing argument the Court inquired whether the argument was then concluded and receiving an affirmative answer the Court stated: "Well, we will now make the finding that the defendant is guilty and he will be remanded to the custody of the Attorney General for a period of three years". (App. p. 32.)

The Court's failure to give an opportunity to petitioner to show cause, if any, as to why the sentence should not be pronounced was in violation of Rule 32 (a) of the Federal Rules of Criminal Procedure and such non-compliance by the Trial Court with the Rules was contrary to due process.

I.

THE DRAFT BOARD'S ORDER ISSUED IN DISREGARD OF REGULATIONS IS VOID.

The State Director of Selective Service of Illinois instructed Petitioner's Draft Board that there should be a "complete reprocessing by your Local Board". (App. pp. 8-9.) The Draft Board failed to do so as clearly appears from Exhibits B to B-36 (App. p. 7), which were admitted into evidence over petitioner's objections; (App. p. 11). Petitioner submits that the failure of the Draft Board to follow its own mandatory regulations makes its order of induction void, and therefore, there was no legal basis for his subsequent prosecution. As it was stated in *United States of America* v. *Robert Allen Underwood*, (D.C. Pa. 1955) 151 F. Supp. 874, that when the Draft Board fails to follow its own regulations "The United States has not made the condition precedent to a prosecution for draft evasion".

Appellant submits that the dissenting opinion of Justice Murphy in *Cox* v. *United States*, 332 U.S. 442, 457, 68 S. CT. 115, is the law as it is applied to this issue. In *United*

States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260, 74 S. CT. 499, this Court held that even though Paragraph 19 (c) of the Immigration Act of 1917, amended in 1948, is a permissive one as to suspension of deportation of an alien, nevertheless, noncompliance with the regulations presents a lack of due process.

Petitioner submits that if in the *Shaughnessy* case, *supra*, a reversal was found proper for lack of due process, even though the regulations there involved were discretionary, in the instant case the failure of the Draft Board to comply with the mandatory regulations requires the granting of certiorari and the review of the issues herein presented.

II.

LACK OF DUE PROCESS BEFORE THE DRAFT BOARD IS NOT CURED BY THE SO-CALLED DE NOVO ACTION OF THE APPEAL BOARD.

The Draft Board believed that petitioner was sincere and honest when he claimed that for reasons of religious training and belief he cannot participate in war in any form and that he ought to be classified as 1-O. Nevertheless, the Draft Board classified him as one who objects to combatant service only. Their reason was that they do not consider it fair to have a 1-O replaced by another draftee since 1-O's do not count towards their quota. Their further reason was that they prayed for the Lord's guidance and they believed that they were guided by the Lord in classifying petitioner in 1-A-O; that they never gave 1-O classification to anyone in their jurisdiction. In essence there was no hearing. We submit that if there was anyone ever deprived of due process, petitioner was by the act of his Draft Board. Such lack of due process cannot be cured by any act of the Appeal Board even though the act of the Appeal Board is *de novo* because

> "the failure of the Local Board to comply with the regulation referred to renders the registrant's classification and his induction order invalid." *Frank* v. *United States*, 216 F. 2d 266, (C.A. 9, Oct. 4, 1954).

In the *Frank* case *supra* it was also said,

> "In a criminal prosecution of this kind, the burden is upon the government to establish the validity of the induction order."

The Circuit Court of Appeals of the Seventh Circuit in the case of *United States* v. *Wilson*, 215 F. 2d 443, said:

> ". . . a registrant who fails to have a fair chance for his proper classification on his appearance before the Local Board has been denied something which cannot be cured through the action of the appeal board. . . ."

As stated in *Mintz* v. *Howlett*, (2 Cir., 1953), 207 F. (2d) 758, 762:

> "Likewise the action of the Appeal Board Panel No. 3 in affirming the reclassification on January 12, 1953, does not improve the case. We have ruled in common with other courts that a registrant is entitled to a full and fair disposition of his contentions at every level of operation of the Selective Service System and that a review by an appeal board may not serve to supply a deficiency in a fair hearing by the local board. *United States* v. *Fry*, 2 Cir., 203 F. (2d) 638, 640; *United States* v. *Stiles*, 3 Cir., 169 F. (2d) 455, 459; *Davis* v. *United States*, 6 Cir., 199 F. (2d) 689, 691; *Knox* v. *United States*, 9 Cir., 200 F. (2d) 398, 301-402."
>
> • • •
>
> "We conclude that petitioner has been denied procedural due process. *Davis* v. *United States, supra*, 6 Cir., 199 F. (2d) 689, and that the order of reclassification is a nullity. *United States* v. *Pekarski*, 2 Cir., 207 F. (2d) 930; *Annett* v. *United States*, 10 Cir., 205

F. (2d) 689; *Estep* v. *United States*, 327 U.S. 114, 66 S. Ct. 423, 90 L. Ed. 567. Petitioner must therefore be discharged."

The decision here involved is in conflict with the decisions of other Circuits and with the decisions of the selfsame Court in another case, *United States* v. *Wilson, supra,* and therefore, a writ of certiorari ought to be granted.

III.

A SELF SERVING STATEMENT BY THE ILLINOIS APPEAL BOARD GIVING NO REASONS OR EXPLANATIONS CANNOT AND DOES NOT TAKE THE PLACE OF BASIS IN FACT THAT IS REQUIRED BY THE HOLDING OF THIS COURT.

This Court, in *Estep* v. *United States*, 327 U.S., 114, 66 S. CT. 423, stated:

> "*The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.*" (p. 427) (Emphasis ours.)

In *Cox* v. *United States*, 332 U.S. 442, 68 S. CT. 115, this Court held that "basis in fact" required in the *Estep* case must be found from within the covers of the Selective Service file of the registrant itself. This Court, in *Dickinson* v. *United States*, 346 U.S. 389, 74 S. CT. 152, held that "The principal and decisive issue before us is whether there was a basis in fact for denying *Dickinson's* claim to ministerial exemption under Section 6(g) of the Universal Military Training and Service Act, 62 Stat. 611, 50 U.S., App. Section 456(g)". This Court reviewed *Dickinson's* file and stated that "We think *Dickinson* made out a case which meets the statutory criteria", (p. 157). On the same page this Court said,

> "The task of the Courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. We have found none here."

This Court insisted ". . . that there be proof that is incompatible with the registrant's proof of exemption." (P. 157.)

Dickinson's conviction was reversed, holding:

> ". . . but when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice." (P. 158.)

In the instant case the Draft Board, itself, found, and put it into writing, that petitioner's claim as a conscientious objector to all military service is sincere and honest, (Exhibit B-59, App. B.) Nevertheless, in defiance of the *Dickinson* holding of this Court, it refused to grant him such classification.

The Appeal Board claimed that it ignored all the conclusions of the Draft Board because it disagreed with it and then without giving any basis in fact, and without pointing to any supporting evidence in petitioner's Selective Service file simply stated that it ". . . independently reached the conclusion" that petitioner is entitled to the selfsame classification that was given to him by the Draft Board in total defiance of the law. Petitioner submits that because the Court of Appeals for the Seventh Circuit by its instant decision is in conflict with the decisions of other Circuits and of this Court, a writ of certiorari ought to be granted to petitioner.

The opinion here involved (App. A, page 3) states that petitioner "sought to prove at the trial that certain Local Board members refused to classify any registrant as 1-O, regardless of qualifications therefore, because, in ascertaining whether the local quota had been filled, 1-O classifications were not counted. *Whether the Local Board applied proper standards was immaterial in view of the Appeal Board's consideration and classification de novo. United States* v. *Chodorski*, 7 Cir., 1957. 240 F. 2d, 590, 591, cert. den. 353 U.S. 950, and cases therein cited". (Emphasis ours.) Petitioner submits that the Court of Appeals for the Seventh Circuit misreads the holding of *United States* v. *Chodorski* and the cases therein cited. As we read that decision, it held that the question in a case of this kind is, whether the original irregularities before the Local Board effect the review by the Appeal Board. The crux of the matter is, does the decision of the Appeal Board perpetuate the procedural errors of the Local Board. We submit that in this case there is a total absence of any basis in fact for the Appeal Board's action and therefore the conclusion is compelling that the original error of the Local Board, that went beyond procedural one and became a substantive one, effected the decision of the Appeal Board. Therefore, the decision of the Court of Appeals here, is in conflict with this Court's decision in *Dickinson* v. *United States*, *supra*. This Court in *Sicurella* v. *United States*, 348 U.S. 385, 75 S. CT. 403 held that ". . . when it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands at least that the government not recommend illegal grounds . . .". See also *United States* v. *Wilson*, *supra*, *Frank* v. *United States*, *supra*, *White* v. *United States*, 215 F.2d 782 (C.A. 9), *Peebles* v. *United States*, 220 F.2d 114 (C.A. 7).

Petitioner submits that all the above cases cited are in conflict with the decision of the Seventh Circuit in this case, and therefore, a writ of certiorari ought to be granted to him.

IV.

THE FAILURE AND THE REFUSAL OF THE TRIAL JUDGE TO SEARCH THE RECORD FOR BASIS IN FACT IS A COMPELLING REASON TO GRANT A WRIT OF CERTIORARI.

The transcript of proceedings discloses that the trial in this case began on December 14, 1959 at 10:00 o'clock A.M. (App. p. 4). At the close of the government's case and after the government exhibits were admitted into evidence, a recess was taken and the Court met pursuant to its order at 2:00 o'clock P.M. Only after the recess did the petitioner introduce into evidence the exhibits on which he relies. (App. p. 31) The transcript discloses that the Trial Court never took the opportunity nor the time, to read the exhibits so offered and the only thing before it was the short identification of the exhibits as they were presented by government's attorney, and as it appears in Appendix D.[1]

Without reading any of the documents, the Court made its finding of guilty (App. p. 31). Petitioner's attorney expressed the thought that the Trial Court might want to read the documents submitted into evidence before making a finding. (App. p. 31). He even offered to point out certain matters in the documents. The Trial Judge's only retort was "You make your regular closing argument, he (meaning the government's attorney) make his, and then you answer". (App. p. 31.) The issue before the Trial Court was whether petitioner made out a *prima facie* case in support of his claim as 1-O, and notwithstanding

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[1] Appendix D is found on pages 1a to 4a of Appendix A in the Appellant's Petition For Rehearing before the United States Court of Appeals and certified to this Court.

such *prima facie* case, the Draft Board and subsequently the Appeal Board, denied petitioner's claim. In such a case it is the Trial Court's duty to search the record, but that was not done in this case.

In *Cox* v. *United States*, *supra*, it was said:

> "Although the Selective Service file was introduced in evidence and the trial court denied the motion for a directed verdict, it does not appear that the trial court examined the file to determine whether the action of the Local Board was arbitrary and capricious or without basis in fact. (445) . . . the Local Board should place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that record show the basis of the Local Board's decision." (p. 450)

It was fatal error on the part of the Trial Court not to search petitioner's Selective Service file because as this Court said in the *Dickinson* case, *supra*, "The task of the courts in cases such as this is to search the record for more affirmative evidence to support the local board's overt or implicit finding that registrant has not painted a complete or accurate picture of his activities".

Petitioner submits that the Trial Court in this case didn't even search, not to speak of finding a basis in fact, for the classification, therefore a writ of certiorari ought to be granted.

V. and VI.

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN ITS OPINION, POINTED TO NO BASIS IN FACT FOR THE DRAFT BOARD OR APPEAL BOARD'S ACTION, AND THEREFORE THERE IS A CONFLICT WITH OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

In App. D is shown the extent of the method used by government's attorney to describe the documents from peti-

tioner's file that he offered into evidence. The Court of Appeals for the Seventh Circuit, on pages 8 and 9 of its Opinion. (App. A) says:

> "The record of the trial shows that the various documents were introduced separately, with brief descriptions of each. . . . These descriptions alone could have provided adequate information for the Trial Court's limited scope of review: ascertaining whether there was a basis in fact for the classification given."

Petitioner submits that to conclude as the Court of Appeals did, surely calls for reliance on "suspicion and speculation" pure and simple. Petitioner submits that the description of the documentary evidence, as appears in App. D, could not have provided the Trial Court with adequate information as to the content of the documents. It surely could not have provided enough information for the Trial Court to find whether there is a basis in fact. Petitioner submits that conclusion on the part of the Circuit Court of Appeals that the sketchy description of the documents could have provided the Trial Court with information sufficient to determine the presence or absence of a basis in fact, is of such grave consequence that it alone requires the granting of the writ of certiorari. The holding is in conflict with other Circuits, and with the holding of the selfsame Circuit and of this Court.

To the same effect: *Estep* v. *United States, supra, Dickinson* v. *United States, supra, Frank* v. *United States, supra, United States* v. *Wilson, supra, White* v. *United States, supra, United States* v. *Fry, supra, United States* v. *Shaughnessy, supra, Peebles* v. *United States, supra, United States* v. *Chodorski, supra, Batterton* v. *United States*, 260 F.2d 233, (C.A. 8).

VII.

32(a) FEDERAL RULE OF CRIMINAL PROCEDURE IS A MANDATORY INSTRUCTION TO THE TRIAL COURT AND FAILURE TO COMPLY IS ERROR.

Rule 32(a) provides that "... Before imposing sentence the Court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment". In *Couch* v. *United States*, (C.A.D.C. 1956) 235 F.2d 519, that Court held that:

> "The proper practice in sentencing a convicted person is to afford him a personal opportunity to make a statement in his own behalf which might include information in mitigation of punishment. Such a statement would be an addition to any made by counsel on behalf of the defendant."

In *Gadsden* v. *United States*, 223 F. 2d 627, it is stated as to Rule 32 (a) that:

> "We think these provisions impose upon the sentencing Court the affirmative duty to ask accused whether he desires to make a statement. First, the language of the rule strongly implies such an obligation. The phrase 'shall permit' . . . which would have been used had the rules been intended to leave the initiative with the accused rather than with the Court. Second, the judgment and commitment form proposed as Form 25 of Appendix of Forms annexed to the Rules, includes the language 'the Court having asked the defendant whether he has anything to say why judgment should not be pronounced . . .'. While this form is illustrative and not mandatory, nevertheless it clearly reflects the understanding of the drafters that such an inquiry is required. Third, authoritative texts and commentators make clear that the final sentence of Rule 32(a)

incorporates into federal criminal practice a broader counterpart of the common-law allocation under which the Court addressed a formal inquiry to the accused.

As the record discloses (App. pp. 31 and 32), the Trial Court here found petitioner guilty twice and *sentenced him twice* to three years, *but not once gave him the opportunity to make a statement in his own behalf.* We argued before the Circuit Court of Appeals that such failure on the part of the Trial Court to comply with 32 (a) of Federal Rules of Criminal Procedure is an error in accordance with the holding of that selfsame Court. In *United States* v. *Wiley*, 267 F.2d 453, 456 (C.A. 7), it was said:

> "We should not lose sight of the fact that, under 18 U.S.C.A. Rule 32 of the Federal Rules of Criminal Procedure, two separate duties were imposed upon the district court. Rule 32(a) required that, before imposing sentence, the Court should afford an opportunity to defendant to present any information in mitigation of punishment. Rule 32(a) provided that the defendant may be placed on probation as provided by law." P. 456.

Since the decision of the Seventh Circuit here involved is in conflict not only with the holdings of other Circuits, but also with the selfsame Court's own decision in another case, writ of certiorari ought to be granted.

VIII.

LACK OF DUE PROCESS REQUIRES THE GRANTING OF WRIT OF CERTIORARI.

In our introductory remarks, we pointed out the repeated violations of due process. These samples of lack of due process are not exhaustive of all violations of due process during the trial in this case as the Record of the Trial discloses. (App. pp. 1-42)

Petitioner submits that on review of the record it must be held that he did not have a fair trial; that his trial was a sham; it was a pretext of a trial.

This Court in *Palko* v. *State of Conn.*, 302 U.S. 319, 58 S. CT. 149, on p. 327 says:

> "Fundamental too, in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after a fair trial. The hearing, moreover, must be a real one, not a sham or pretense."

Petitioner submits that all the proceedings before his Draft Board, the review by the Illinois State Appeal Board and before the Trial Court were a sham and that, therefore, this Court ought to grant him a writ of certiorari.

In the *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 71 S. CT. 624, on pages 149 to 174, Justice Frankfurter stated:

> "The requirement of 'due process' is not a fairweather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But 'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. 'Due process' is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process

of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. (pp. 162 and 163.)

"The heart of the matter is that democracy implies respect for the elementary rights of men, however, suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . ."

Petitioner respectfully submits that he is neither suspect nor unworthy; that he is, as it was found by his Draft Board, a sincere and honest religious objector to war, but whether he is suspect or unworthy, even then, the heart of the matter is that democracy implies respect for the elementary rights of man. He submits that he was not judged with respect to his right as a man.

CONCLUSION.

This Court has said "due process of law . . . is a compendious expression of all those rights which the courts must enforce because they are basic to our free society . . ." *Wolf* v. *Cohn*, 338 U.S. 25, 27. Petitioner submits that his case involves rights which must be enforced because they are basic to our free society. The writ of certiorari ought to be granted.

Respectfully submitted,

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Chicago, Illinois,
January 30, 1961.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1960—SEPTEMBER SESSION, 1960

No. 12967
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD PETER VAN HOOK,
Defendant-Appellant.

Appeal from the United States District Court, for the Northern District of Illinois, Eastern Division.

November 22, 1960

Before HASTINGS, *Chief Judge*, KNOCH, *Circuit Judge*, and MERCER, *District Judge*.

KNOCH, *Circuit Judge*. Defendant was indicted for felonious refusal to submit to induction in violation of the Universal Military Training and Service Act. He pleaded not guilty and waived trial by jury. The District Court found defendant guilty and sentenced him to imprisonment for three years. Defendant brought this appeal.

The order to report for induction was based on a Selective Service Classification of 1-A-O (non-combatant service with the United States Armed Forces) made by the Illinois State Appeal Board, to which defendant had appealed from a 1-A-O classification made by his local board in Sullivan County, Illinois.

Defendant contends that the government's exhibits B to B-36 (documents from defendant's Selective Service

file) were improperly admitted in evidence. These dealt with defendant's prior refusal of induction in 1953. They were part of a file returned to the local board under date of May 10, 1955, for reprocessing in the light of recent court decisions, as a result of which the United States Attorney and the Illinois State Headquarters of the Selective Service System were then closing their file on defendant.

By virtue of the local board's failure to start proceedings anew, defendant argues that he was prevented from supplying such additional information as he might have provided had new questionnaires and forms been sent to him. He mentions, for example, that his religious convictions had deepened between 1952 and 1955. However, the record shows that defendant was given an opportunity to present to the local board and to the State appeal board, which considered the matter *de novo*, any additional statements or affidavits touching his requested classification of 1-O (conscientious objector to both combatant and non-combatant service).

It appears from the record that documents from the Selective Service file were admitted as official records. Government counsel when offering the file, made it clear at the outset that defendant was being tried solely for the 1957 refusal of induction (pursuant to defendant's 1957 classification) and not for defendant's prior refusal of induction in 1953 (pursuant to a 1951 classification). There was no jury. We are satisfied that the District Court considered only the relevant data.

Defendant also complains of the admission of government's exhibit B-59, a letter dated September 10, 1957, sent to the local board by the State appeal board, in which the appeal board states that its members have reached their conclusion that defendant should be classified 1-A-O on the basis of the facts set out before it, and independently of the conclusions of the local board.

The State appeal board, with the local board, and the Presidential appeal board, all have concurrent power to determine questions and claims respecting classification,

and each considers anew the matter of appropriate classification independently of the others. Defendant contends that the local board failed to apply proper standards. He sought to prove at the trial that certain local board members refused to classify any registrant as 1-O, regardless of qualifications therefor, because, in ascertaining whether the local quota had been filled, 1-O classifications were not counted. Whether the local board applied proper standards was immaterial in view of the appeal board's consideration and classification *de novo*. *U. S.* v. *Chodorski*, 7 Cir., 1957, 240 F. 2d 590, 591, cert. den. 353 U. S. 950, and cases therein cited.

We cannot accept defendant's characterization of the appeal board's letter as a mere "self-serving document." It was an official record of the action taken, wherein the appeal board stated:

> "We find we are in disagreement with certain conclusions of the local board as set forth in the memoranda of the actions taken by the local board in classifying this registrant. For this reason we are entirely ignoring all of the local board's conclusions as stated in their memoranda.
>
> "We note that the registrant's file appears to be full and complete and that the registrant and all other interested parties have been given unlimited opportunity to place in his cover sheet all of the facts he desired to file or to have filed on his behalf in support of his claim as a conscientious objector."

Defendant invites our attention to *Ypparila* v. *U.S.*, 10 Cir., 1954, 219 F. 2d 465, as support for his position that the State appeal board's letter was an inadequate statement. In that case a State board had classified Ypparila as 1-A-O in January, 1952. The National Selective Service Appeal Board in January, 1953, classified him as 1-A. The Department of Justice had been reconsidering the status of Jehovah's Witnesses, in view of a recently published article indicating that Jehovah's Witnesses were not pacifists because they believed in participation in

theocratic wars and in the Armageddon prophesied in Revelations. The Department of Justice began to rule that registrants who were Jehovah's Witnesses and who believed in participation in theocratic wars and Armageddon, were not conscientiously opposed to participation in war of any form.

The Court in the *Ypparila* case said that the National Board was not required to make formal findings or render opinions as a basis for its action, but that in the instant case, the Board should have indicated whether it disagreed with the findings of the prior adjudicators, or whether it was basing its classification on the legal proposition that Ypparila, being a Jehovah's Witness, could not claim he was conscientiously opposed to participation in war of any form. In the latter event, the Court thought that the Board's classification would have been arbitrary.

Defendant also relies on *U. S.* v. *Wilson*, 7 Cir., 1954, 215 F. 2d 443. Kendall K. Wilson, a member of Jehovah's Witnesses, was classified 1-O by his local board. Although Wilson had applied for classification as a conscientious objector, he asserted that he was also entitled to classification as a minister of religion, and he appealed. The appeal board classified him 1-O. He then had his file sent to the National Director. The National Selective Service Board, without any further evidence, without seeing Wilson, on the basis of the contents of the file alone, classified him 1-A without stating any reason. This Court found nothing in the file inconsistent with the classification made by the local and appeal boards. The government argued that by insisting on classification as a minister, Wilson had abandoned his classification as a conscientious objector; that his employment as a railway operator and his willingness to participate in theocratic wars were inconsistent with conscientious objection to participation in war. This Court found these arguments without merit and held that the ruling of the National Selective Service Board was arbitrary, capricious and without basis in fact.

These cases are clearly distinguished from the case before us here.

It is defendant's position that no corpus delicti was established. One witness, a Federal Bureau of Investigation Special Agent, testified to defendant's admission, some months after the alleged act, that he "did not submit to induction on the morning of October 3, 1957." Defendant argues that this admission was insufficient proof.

The government also introduced, over defendant's objection, exhibit B-74, which reads as follows:

"3 October 1957

"U.S. District Attorney
219 S. Clark Street
Chicago, Illinois

"Dear Sir:

"In compliance with Paragraph 27b, Special Regulations 615-180-1, Department of the Army, dated 5 November 1951, the name and circumstances surrounding the refusal of VAN HOOK, Donald Peter, 1008 S. Hamilton St. Sullivan, Illinois, Selective Service Number 11 177 33 32, who refused to submit to induction into the Armed Forces of the United States is hereby submitted:

"Donald Peter Van Hook was ordered to report for induction into the Armed Forces of the United States on Thursday 3 October 1957 by Selective Service, Local Board No. 177, who address is County Court House, Sullivan, Illinois. Mr. Van Hook refused induction on the grounds that he is a 'Conscientious Objector' and stated his religious belief 'Church of Jesus Christ' will not permit him to be inducted. Mr. Van Hook was asked to make a signed statement in his own handwriting confirming his refusal to submit to induction which he refused to do. It was explained to the registrant that his refusal to submit to induction would constitute a felony under the provisions of Selective Service Regulations, and was informed that a conviction of such a nature would subject him to punishment of either five (5) years of imprisonment and a fine of not more than $10,000.00 or both. Capt. Walter H. Schuttler, AGC, Capt. Victor C.

Lien, Inf. and Sgt. Jack Paton, RA 36112640 were witnesses to the registrant's refusal to submit to induction.

"This matter is being referred to your office for necessary action.

"Very truly yours,
W. H. SCHUTTLER
Capt. AGC
Deputy CO for
Induction"

Defendant objected to the admission of this document on the ground that it was hearsay, as Captain Schuttler was not present to be cross-examined. The District Court admitted the exhibit as an official document under authority of Title 28, U.S.C.A. §1733(a):

> "Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

There are two main reasons given for this exception to the hearsay rule: (1) the practical necessity for use of such records, to which is attached the presumption of proper performance of official duty, and the likelihood that a public official would have no memory of his actions in making numerous similar entries; and (2) the inconvenience of calling to the witness stand all over the country, government officers who in the course of their duties have made such numerous similar written statements concerning events coming within their jurisdiction. *Wong Wing Foo* v. *McGrath*, 9 Cir., 1952, 196 F. 2d 120, 123; *Olender* v. *U. S.*, 9 Cir., 1954, 210 F. 2d 795, 801, cert. den. 352 U. S. 982; *Howard* v. *U. S.*, D. C. Cir., 1960, 278 F. 2d 872, 873-4

The precise method of induction is not prescribed by Congressional Statute nor Federal Regulation. Accordingly the Department of the Army has established a procedure by special regulation. The regulation in effect at the time Captain Schuttler wrote his letter reads:

"*Paragraph 28, Army Regulation 601-270, effective 5 April 1956:*

"*b. Registrants who refuse to submit to induction.* Any registrant removed from the group as prescribed in paragraph 24*b* and who persists in his refusal to submit to induction will be informed that such refusal constitutes a felony under the provisions of the Universal Military Training and Service Act, as amended. He will be informed further that conviction of an offense under civil proceedings will subject him to be punished by imprisonment for not more than 5 years or a fine of not more than $10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 24*a*, and his name and service again will be called. If he steps forward at this time, he will be informed that he is a member of the armed service concerned, using the language specified in paragraph 24*c*. If, however, he persists in refusing to be inducted, the following action will be taken:

(1) The registrant will be requested, but not required to make a signed statement, dated, in his own handwriting, as follows: 'I refuse to be inducted into the Armed Services of the United States.' Such statement should be witnessed by at least two witnesses who will affix their signatures to the statement. Registrants who refuse induction will not be furnished any means of transportation.

(2) Letter of notification of refusal to submit to induction will be prepared in quadruplicate. The original, together with the voluntary statement described in (1) above, will be submitted to the United States Attorney for the district in which the registrant refused to be inducted. One copy will be forwarded to the State director, Selective Service System, of the State in which the registrant refused to be inducted; *one copy will be forwarded to the Selective Service local board which delivered the registrant for induction;* and

the other copy will be retained at the induction station. Such notification will include the following information:

(a) Name and address of registrant.

(b) His Selective Service number.

(c) Number and address of the Selective Service local board which delivered the registrant for induction and, if different, the registrant's own Selective Service local board.

(d) A detailed statement of facts concerning the registrant's refusal to be inducted.

(e) Names and addresses of witnesses."

In his letter, Captain Schuttler refers to Paragraph 27b, Special Regulations 615-180-1, dated November 5, 1951, which, at the time he wrote, had been superseded by the above quoted regulation. The new regulation reads almost word for word with 615-180-1 and contains identical provisions. We do not consider this clerical error of any material effect.

Captain Schuttler was acting pursuant to lawful command in recording the event. Defendant contends that insofar as Captain Schuttler does not state that defendant stood fast when his name and service were called, Captain Schuttler was merely expressing an opinion in stating that defendant refused induction. We cannot agree. The reference to the regulation, which prescribes the induction procedure; the report of defendant's statement, the warning given to defendant, the refusal to make a signed statement, and the names of the witnesses, all indicate that government's exhibit B-74 was properly admitted as an official document to prove the occurrence.

We are satisfied that the corpus delicti was established by the independent evidence of Captain Schuttler's letter and the testimony of the Special Agent, noted above.

Chernekoff v. *U. S.*, 9 Cir., 1955, 219 F. 2d 721, is clearly distinguished from this case. There the evidence showed that Chernekoff reported to the induction center, but was given neither the opportunity to step forward nor the prescribed warning. The Army deemed it useless

to comply with the pertinent regulation because Chernekoff had said he would not step forward if asked to do so. The Court indicated that Chernekoff might have changed his mind after the warning and an opportunity to submit to induction.

The parties are agreed that the Trial Court's power of review is limited to determining whether there is a factual basis for the classification given. The Trial Court was not authorized to weigh the evidence to ascertain whether the classification was justified. *Estep* v. *U.S.*, 327 U. S. 114, 122-3 (1946).

Defendant asserts that the Trial Court erred in failing to search the record to determine whether there was a basis in fact for denial of defendant's requested classification of 1-O. Defendant bases this contention on the assertion that there was no time for the Court to have studied the file before sentence was imposed. The record of the trial shows that the various documents were introduced separately, with brief descriptions of each. In the course of argument both counsel made references to various documents and their contents. For example, government counsel referred to the Pastor's statement that defendant's church maintained a business called Community Industries which undertook government contracts to provide such items as candy for servicemen and uniforms for nurses. At another point in the argument, the Court asked for the appeal board's letter. Government counsel showed the document to the Court and also read aloud from it. Counsel for defendant would surely have invited the Court's attention to inaccuracies in description or quotation. Defendant's counsel also described the contents of various portions of the file in some detail.

These descriptions alone could have provided adequate information for the Trial Court's limited scope of review: ascertaining whether there was a basis in fact for the classification given. He was not required to negative a basis for the classification requested by defendant.

We have examined all other arguments advanced by defendant and find them without merit. The judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit
Chicago 10, Illinois

Tuesday, November 22, 1960

Before

Hon. John S. Hastings, Chief Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Frederick O. Mercer, District Judge

United States of America, Plaintiff-Appellee, vs. Donald Peter Van Hook, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12967

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit.
Chicago 10, Illinois

Tuesday, January 10, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Frederick O. Mercer, District Judge

United States of America, Plaintiff-Appellee, No. 12967 vs. Donald Peter Van Hook, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Tuesday, January 10, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Latham Castle, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Donald Peter Van Hook, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12967

On consideration of the motion of Donald Peter Van Hook, defendant-appellant, for rehearing *en banc*, it appearing that all members of the court in active service have voted to deny the same; It Is Ordered by the court that the motion of defen lant-appellant for a rehearing of the above cause *en banc* be and the same is hereby denied.

APPENDIX B.

28 U.S.C. 1733 (a); 62 Stat. 946 GOVERNMENT RECORDS AND PAPERS; COPIES.

(a) Books or records of account or minutes or proceedings of any department or agency of the United States shall be admissable to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts or any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the orignals thereof. June 25, 1948 c. 646, 62 Stat. 946.

50 U.S.C. 462; 62 Stat. 622—OFFENSES AND PENALTIES.

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (sections 451-454 and 455-471 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title (said sections), rules, regulations, or directions who shall knowingly make, or be a party to the making of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title (said sections), or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title (said sections), or who knowingly counsels, aids, or abets

another to refuse or evade registration or service in the armed forces or any of the requirements of this title (said sections), or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title (said sections), or rules, regulations, or directions made pursuant to this title (said sections), or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title (said sections) unless such person has been actually inducted for the training and service prescribed under this title (said sections) or unless he is subject to trial by court martial under laws in force prior to the enactment of this title (June 24, 1948). Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing. . . • • • June 24, 1948, c. 625, Title 1, p. 12, 62 Stat. 622.

Part 1623—CLASSIFICATION PROCEDURE.

1623.4 Action To Be Taken When Classification Determined.—(a) As soon as practicable after the local board has classified or reclassified a registrant (except a registrant who is classified in Class I-C because of his entering active service in the armed forces) it shall mail a notice thereof on a Notice of Classification (SSS Form No. 110) to the registrant. When a registrant is classified in Class I-S, Class II-A, Class II-C, or Class II-S the date of the termination of the deferment shall be entered on the Notice of Classification (SSS Form No. 110).

(b) As soon as practicable after the local board has classified or reclassified a registrant into any class other than Class V-A, it shall mail a notice thereof on a Classification Advice (SSS Form No. 111) to every person who has on file any written request for the current deferment of the registrant. When a registrant is classified in Class I-S, Class II-A, Class II-C, or in Class II-S the date of the termination of the deferment shall be entered on the Classification Advice (SSS Form No. 111).

(c) After each local board meeting, a copy of the Local Board Action Report (SSS Form No. 112-B), listing the registrants who have been classified or whose classifications have been changed, shall be posted in a conspicuous place in the office of the local board. When a person is unable to ascertain the current classification of a registrant from a posted copy of the Local Board Action Report (SSS Form No. 112-B), an employee of the local board, upon request, shall consult the Classification Record (SSS Form No. 102) and shall furnish the person making inquiry the current classification of such registrant.

(d) When the local board classifies or changes the classification of a registrant, it shall record such classification on the Classification Questionnaire (SSS Form No. 100), the Classification Record (SSS Form No. 102), and in the space provided therefor on the face of the Cover Sheet (SSS Form No. 101).

(e) When the Notice of Classification (SSS Form No. 110), is mailed, the date of mailing such notice shall be entered on the Classification Record (SSS Form No. 102) and on the Classification Questionnaire (SSS Form No. 100). When the Classification Advice (SSS Form No. 111) is mailed, the date of mailing of each such advice and the name of the person to whom it is mailed shall be entered on the Classification Questionnaire (SSS Form No. 100).

CLASSIFICATION ANEW.

1625.11 Classification Considered Anew When Reopened.—When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

1625.12 Notice of Action When Classification Considered Anew.—When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

18 U.S.C. Rule 32(a) RULES OF CRIMINAL PROCEDURE.

Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

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Office-Supreme Court, U.S.
FILED
MAR 13 1961
JAMES R. BROWNING, Clerk

No. 805

In the Supreme Court of the United States

OCTOBER TERM, 1960

DONALD PETER VAN HOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 705

DONALD PETER VAN HOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Vol. III, 1-9; Pet. App. 1-9) is reported at 284 F.2d 489.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1960 (Pet. App. 10). A petition

[1] The record consists of three volumes and an appendix of the trial transcript, each of which is separately paginated. Volumes I and II contain selected government and defense exhibits at the trial, respectively. Volume III constitutes the proceedings in the court of appeals.

for rehearing was denied on January 10, 1961 (Pet. App. 11, 12). The petition for a writ of certiorari was filed on February 8, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was adequate proof that petitioner had refused to be inducted.

2. Whether there was basis in fact for petitioner's classification in selective service class 1-A-O (noncombatant service).

3. Whether the petitioner was afforded the proper procedures before the local and appellate selective service boards.

4. Whether the petitioner was properly sentenced.

STATUTE AND RULE INVOLVED

28 U.S.C. 1733 provides:

> (a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> (b) Properly authenticated copies or transcripts or any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

Rule 32, F.R. Crim. Proc., provides in pertinent part:

> (a) Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the

bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

STATEMENT

An indictment returned in the District Court for the Northern District of Illinois charged that the petitioner, on October 3, 1957, willfully refused to submit to induction into the armed forces of the United States, in violation of 50 U.S.C. (App.) 462. Following a trial to the court (a jury trial having been waived), petitioner was found guilty and sentenced to three years' imprisonment (App. 31, 33). On appeal, the court of appeals affirmed (Vol. III, 1-9, 10).

The pertinent facts may be summarized as follows:

1. Petitioner is a member of the Harshmanite Church which is opposed to all forms of military training and service. During 1955, petitioner had a Selective Service Classification of I-A-O from Local Selective Service Board No. 177 of Sullivan, Illinois. This classification qualified the petitioner for non-combatant military service in the armed forces of the United States. In 1955, petitioner sought to have this classification changed to a I-O classification which would exempt him, as a conscientious objector, from all forms of military training and service. On May 10, 1955, the Deputy Selective Service Director for Illinois informed Local Board No. 177 that petitioner's file would be returned to them for "complete re-processing" and that the office of the Illinois Selec-

tive Service Director was "closing [its] file in the matter" (Vol. II, 6).

Thereafter, Local Board No. 177, which was then composed of different members from those who had previously classified petitioner, reclassified him in class I-A-O. On November 14, 1955, petitioner appeared before the local board and challenged his I-A-O classification as violating his religious beliefs. He said that the board "should know that the previous board was prejudice[d]" against him, and that he was entitled, as a conscientious objector, to a I-O classification (Vol. I, 21). The board stated that it was a "new board", that petitioner was given a "new classification", and that they took petitioner's religious background into consideration in classifying him I-A-O. The board also pointed out that, since I-O classifications were not counted in the fulfillment of the board's draft quota, it would be unfair to require another registrant to take the place of the petitioner; and that all the conscientious objectors of Moultrie County were given I-A-O classifications (Vol. I, 22). Petitioner then appealed to the State Selective Service Appeal Board.

2. Pursuant to Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. (App.) 456(j), the Department of Justice investigated petitioner's case for the purpose of making a recommendation to the State Appeal Board. After a hearing, the Department recommended that petitioner be given a I-A-O classification because he was working in an industry which was engaged in the manufacture of defense products under government contract

(Vol. I, 24-27). The Department pointed out that, although the petitioner had established his conscientious objection to combat military training and service, he had "failed to sustain his claim with respect to noncombatant service."

3. On May 10, 1957, the Illinois Appeal Board determined that petitioner's "proper classification" was I-A-O. In reaching this conclusion, the board specifically disagreed with and ignored the conclusions arrived at by the local board. The appeal board said (Vol. I, 30):

> We find we are in disagreement with certain conclusions of the local board as set forth in the memoranda of the actions taken by the local board in classifying this registrant. For this reason we are entirely ignoring all of the local board's conclusions as stated in their memoranda.
>
> We note that the registrant's file appears to be full and complete and that the registrant and all other interested parties have been given unlimited opportunity to place in his cover sheet all of the facts he desired to file or to have filed on his behalf in support of his claim as a conscientious objector.
>
> We have considered Mr. Van Hook's complete cover sheet as above explained, and we have considered the recommendation of the Department of Justice without being bound by it, and we have independently reached the conclusion that Registrant Van Hook is eligible for Class I-A-O, as a conscientious objector to combatant training and service as defined by the Act of Congress, but that he is not eligible for Class I-O as a conscientious objector to both combatant and noncombatant service as defined by the Congress.

4. Local Board No. 177 subsequently ordered the petitioner to be inducted for noncombatant service into the armed forces. On October 3, 1957, in Chicago, Illinois, petitioner willfully refused to submit to induction into the armed forces on the ground that his church would not permit him to be inducted (Vol. I, 31; App. 16-17).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 3, 15-16, 19) that there was no adequate proof that he refused to be inducted. In a letter to the United States Attorney, Captain W. H. Schuttler, the Deputy Commanding Officer at the induction center in Chicago, formally reported that the petitioner, on October 3, 1957, refused to submit to induction into the armed forces (Vol. I, 31). This letter, which was introduced into evidence at the trial, stated that the petitioner had said that his religion would not permit him to be inducted, that he refused to sign a written statement confirming his refusal to submit to induction, that he was advised that his refusal constituted a felony which would subject him to fine and imprisonment, and that three members of the military witnessed his "refusal to submit to induction" (Vol. I, 31). This letter was submitted to the United States Attorney in accordance with paragraph 28 of Department of the Army Regulation 601-270, effective April 5, 1956.[2] Contrary to petitioner's conten-

[2] In his letter, Captain Schuttler referred to paragraph 27(b) of Special Regulation 615-180-1 which, at the time he wrote the letter, had been superseded by paragraph 28 of

tion (Pet. 15-16, 19), the letter was properly introduced, under 28 U.S.C. 1733, *supra*, p. 2, as a government record of an "occurrence." Moreover, in February 1958, petitioner told an F.B.I. agent that he reported for induction but that "he did not submit to induction on the morning of October 3, 1957" (App. 17). As the court below held (Pet. App. 5-8), this evidence was sufficient to show petitioner's refusal to submit to induction.

2. Petitioner also contends (Pet. 23-26) that the decision that he should be put in class I-A-O lacked any factual basis. He argues, first, that there was no proper basis for his classification by the local board, and that this error of the local board "[a]ffected the decision of the Appeal Board." There is, however, no occasion to review the proceedings before the local board since petitioner's classification—the one upon which he was ordered to report and to submit to induction—was reached after full consideration and classification *de novo* by the Appeal Board. Whether the local board applied proper standards is, therefore, immaterial, as the court below pointed out (Pet. App., 3; Vol. III, 3). To the same effect, see *Goetz* v. *United States*, 216 F. 2d 270, 272 (C.A. 9); *United States* v. *Hartman*, 209 F. 2d 366, 368 (C.A. 2); *Evans* v. *United States*, 252 F. 2d 509, 511 (C.A. 9); *United States* v. *Moore*, 217 F. 2d 428, 433-434 (C.A. 7), reversed on other grounds, 348 U.S. 966; *Tyrrell* v. *United States*, 200 F. 2d 8, 11 (C.A. 9), certiorari

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Department of the Army Regulation 601-270. However, the latter regulation is an almost verbatim restatement of the former one.

denied, 345 U.S. 910; *Reed* v. *United States*, 205 F. 2d 216, 218 (C.A. 9), certiorari denied, 346 U.S. 908; *United States* v. *Chodorski*, 240 F. 2d 590, 591 (C.A. 7), certiorari denied, 353 U.S. 950. The appeal procedure would have little utility if errors before a local board, which the appeal board recognized and avoided, were deemed to infect the appellate classification. Here, the Appeal Board specifically stated that it was acting independently and *de novo*.

The decision of the Appeal Board, which is all that is now at issue, was appropriately supported by the requisite factual basis. Government Exhibits B-10 and B-55, which were in the petitioner's selective service file, indicated that he had worked for a number of years for the "Community Industries", a "factory" run by the Harshmanite Church, which manufactured under government contract various items used by the armed forces (*i.e.*, candy for army rations, tents, WAC uniforms, and naval compressors). The fact that the petitioner engaged in the manufacture of items which were used directly in the war effort—the basis of the recommendation by the Department of Justice (Vol. I, 26)—constituted a sufficient foundation for his classification of I-A-O (noncombatant service). *Blalock* v. *United States*, 247 F. 2d 615, 619 (C.A. 4); *White* v. *United States*, 215 F. 2d 782, 786 (C.A. 9), certiorari denied, 348 U.S. 970; *United States* v. *Moore*, 217 F. 2d 428, 434-435 (C.A. 7), reversed on other grounds, 348 U.S. 966; *Meredith* v. *United States*, 247 F. 2d 622, 623 (C.A. 4); *Jones* v. *United States*, 241 F. 2d 704, 705-706

(C.A. 4). See also *Clark* v. *United States*, 217 F. 2d 511, 515 (C.A. 9).

The standard for court review of a selective service classification is, of course, a limited one. As this Court pointed out in *Witmer* v. *United States*, 348 U.S. 375, 380-381: "It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson* v. *United States*, 346 U.S. 389, 396 (1953). The classification can be overturned only if it has 'no basis in fact.' *Estep* v. *United States*, 327 U.S. 114, 122 (1946)." Under this standard, there was plainly sufficient grounding for the Appeal Board's determination.

Petitioner's corollary claim (Pet. 26-27) that the trial court did not adequately search the record to ascertain whether there was a basis in fact for his classification is refuted by the record. At the conclusion of the government's case, counsel for the petitioner moved for a judgment of acquittal on the ground that there was no factual basis for the local board "to refuse to grant defendant the classification of 1-O as requested by him" (App. 19). During argument on the motion, government counsel specifically called the court's attention to the fact that petitioner had worked for a number of years at the "Community Industries" which engaged in defense production work under government contract (App. 23). Government Exhibits B-10, B-55 and B-57, which were before the court, spelled out the work of

the "Community Industries" and petitioner's relationship to that organization (Vol. I, 1-19, 24-27, 28-29).

Petitioner makes the strained argument (Pet. 27-28) that the opinion of the court of appeals "calls for reliance on 'suspicion and speculation'" in ascertaining whether there was a factual basis for his classification. This is not so. The court of appeals merely pointed out that the exhibits were separately introduced "with brief descriptions of each"; that, during the course of argument, counsel on both sides made specific references to "documents and their contents", among which was one from the Pastor of the Harshmanite Church (Government Exhibit B-10) indicating that that Church operated a factory which engaged in defense production work; that the court called for the "appeal board's letter"; and that counsel for the petitioner "described the contents of various portions of the file in some detail" (Pet. App. 9; Vol. III, 9). The appellate court then concluded that "[t]hese descriptions alone could have provided adequate information for the Trial Court's limited scope of review: ascertaining whether there was a basis in fact for the classification given" (Pet. App. 9; Vol. III, 9).

3. Petitioner contends (Pet. 20-21) that the instructions from the Appeal Board, on May 10, 1955, to the local board to reprocess the petitioner's case were disregarded by the local board, and that, therefore, his classification by the local board was void. But, as already indicated, *supra*, pp. 7-8, the proceedings before the local board are immaterial in the present posture of the case since petitioner's classifi-

cation was given him following *de novo* consideration and classification by the Appeal Board.[3] Moreover (in addition to the fact that the petitioner failed to raise this issue below), the contention is without foundation. When petitioner appeared before the local board on November 28, 1955, the board informed him that it was a "new board", that it considered petitioner's religion in classifying him I-A-O, and that he was given "*entirely a new classification*" (Vol. I, 21) [emphasis added].

The general contention (Pet. 30-32) that the proceedings before the Appeal Board were a "sham" is likewise without support in the record. Petitioner was accorded full opportunity to present evidence for his selective service file. He admitted that he received a resume of the F.B.I. report and a copy of the recommendation of the Department of Justice, and that he was "allowed to file all documents on his behalf" and "to present his case adequately" before the local board (App. 16).[4] The Appeal Board noted that petitioner's file appeared to be "full and complete", and that the petitioner and all other interested parties were given an "unlimited opportunity" to have evidence on his behalf inserted in his file (Vol. I, 30).

---

[3] This point also disposes of petitioner's contention (Pet. 21-23, 31) that he was denied a fair hearing by the local board.

[4] This Court, in *Simmons* v. *United States*, 348 U.S. 397, and *Gonzales* v. *United States*, 348 U.S. 407, held that defendants there involved were entitled, respectively, to a fair resume of the F.B.I. reports and a copy of the recommendations of the Department of Justice to the Appeal Board.

It was only after full consideration of his file, together with the Departmental recommendations, that the Appeal Board placed petitioner in class I-A-O (Vol. I, 30).

4. The trial court, which heard the case without a jury, announced a finding of guilty and imposed a sentence of three years. When defense counsel called attention to the fact that he had not made a closing argument, the court permitted him to do so, and thereafter again announced its finding of guilt and sentence (App. 31-32).

5. Since the court did not ask either petitioner or counsel whether he had anything to say with respect to sentence, there was no compliance at all with Rule 32(a), F.R. Crim. P., *supra*, pp. 2-3. In view of this Court's ruling in *Green* v. *United States*, No. 70, decided February 27, 1961, petitioner should be resentenced.

CONCLUSION

Because of the lack of compliance with Rule 32(a), F.R. Crim. P., the government suggests that the petition for a writ of certiorari should be granted and the cause remanded to the district court for re-sentencing. In all other respects, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1961.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 705

DONALD PETER VAN HOOK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF TO THE MEMORANDUM FOR THE UNITED STATES.

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OCTOBER TERM, A. D. 1960.

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vs.

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REPLY BRIEF TO THE MEMORANDUM FOR THE UNITED STATES.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner believes that this Reply Brief[1] to the Memorandum of the United States under Rule 24 (4) is going

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[1] For the purpose of clarity we shall,—as in the original Petition,—refer to the Appendix filed before the United States Court of Appeals for the Seventh Circuit as (App. page .....). Appendix A is the Opinion of the United States Court of Appeals for the Seventh Circuit attached to the original Petition. Appendix B, the pertinent Statutes and Regulations appear as pages 13a to 16a of the original Petition. Appendix C is the Exhibit volume submitted to the United States Court of Appeals for the Seventh Circuit and certified to this Court. Appendix D is found on pages 1a to 4a of Appellant's Petition for Rehearing filed before the United States Court of Appeals for the Seventh Circuit and certified to this Court.

to be helpful to the Court because; Firstly, there are certain factual as well as legal errors in the Memorandum; Secondly, because a pertinent case was reported after the Petition was filed herein, and Thirdly, because the conclusion and recommendation of the Memorandum for the United States, that *Green* v. *United States,* No. 70, decided by this Court on February 27, 1961, suggests nothing more but that the cause be remanded to the District Court for resentencing is clearly contrary to law.

ARGUMENT.

On pages 4 and 5 of the Memorandum a reference is made to the investigation of Petitioner's case and the recommendation made by the Department of Justice to the State Appeal Board. Petitioner submits that it is of significance to point out that such recommendation (App. C. Government Exhibit B-55) is dated November 16, 1956, and it is further significant that reference is made therein to a former recommendation by the Department of Justice "on the date of March 25, 1953" (page 2 of Exhibit B-55) from which it is quoted "the Church of which registrant is a member and upon whose teachings he bases his claim is engaged in the production of defense products under government contract." In 1953, the Department of Justice used this as the basis from which to conclude that Petitioner failed to sustain his claim with respect to non-combatant service. The Memorandum fails to point out, and thus makes an error of omission, that the Department of Justice report of 1956 (Exhibit B-55, page 3) further says that petitioner "impressed the Hearing Officers with his frank and truthful attitude. The Hearing Officer found that the registrant is a sincere and conscientious member of his denomination and that by reason of his religious training and beliefs conscientiously opposed to combatant military training and service in the armed forces. The Hearing Officer found, however, *the distinction that registrant attempts to draw between noncombatant participation in war as a civilian and similar noncombatant participation as a member of the armed forces was too tenuous for recognition . . .*" (emphasis ours)

The Memorandum failed to point out that the resumé of inquiry attached to the Department of Justice's recommendation of 1956 (App. C Exhibit B-57) points out that

> "Neighbors and associates unanimously advise that registrant is of good character, habits and reputation; that he is regular in his attendance at church services and he is generally honest and sincere . . . never heard of the registrant participating or acting in any manner which would be in contradiction to the beliefs of the church . . . always conducted himself according to the teachings of the church. Interviewees unanimously stated that registrant has never been in trouble and that they had no reason to doubt the sincerity of his claim. . . . Registrant and his family . . . are individuals whose reputation and sincerity regarding their beliefs are above reproach . . . would recommend him as to his sincerity in his conscientious-objector claim. The pastor of the Church . . . defended her church's position by what she called the Law of Love and she added that the people of her congregation would not protect their property if it meant injury to others."

The Memorandum errs further, by ommission and, by its failure o consider Petitioner's anwser to the recommendation of the Department of Justice (App. C, Def's. Exhibit 18). It particularly errs when it fails to consider Petitioner's answer to the effect that contrary to the Department of Justice's conclusions, *the Church of Jesus Christ is not engaged in any industry nor is it producing anything under government contract;* that Community Industries involved is a legal entity of its own which is operated by members of the church but not by the church itself.

The Memorandum fails to take into consideration Petitioner's answer to the Department of Justice's recom-

mendation where it states "*my conscience is on trial not Community Industries.*"

The Memorandum failed to consider Petitioner's claim to exemption both combatant and noncombatant service, because of his religious training and belief as it is set forth in defendant's exhibit 18. (App. C, page 33).

The Memorandum for the United States (page 4) emphasizes that the Board which classified Petitioner in 1955 "was then composed of different members from those who had previously classified Petitioner" and further emphasized that he was given a "new" classification. The Memorandum fails to point out that this "new" classification was exactly the same that was given to him by the prior Board, that is 1-A-O, exempting him from combatant service only. The Memorandum erred when it failed to point out, as it so clearly appears from Government exhibit B-50 (App. C, pages 21-23)—that this "new Board" did "recognize his sincerity in his belief and his church". The Memorandum failed to point out that before the new Board reclassified Petitioner exactly as he was classified before, the members "prayed to God for understanding and guidance in the classification thereof. We truly believe that we have been guided and we took a secret ballot. The ballot was a unanimous vote of all Board members leading to the *classification of 1-A-O for all conscientious-objectors of Moultrie County.* We do not have a registrant classified 1-o in our files today." (emphasis ours)

The Memorandum for the Government erroneously argues against Petitioner's objection to the introduction of the letter of Captain W. H. Schuttler (page 6 and 7). It argues erroneously because the thrust of Petitioner's argument was that this letter does not and ought not to take the place of proof of *corpus delicti*, notwith-

standing 28 U.S.C. 1733, and notwithstanding Army Regulation 601-270 or 615-180-1. Petitioner's argument was that the admission of this letter in absence of the writer thereof deprived him of the right of cross-examination; that it expressed nothing but an opinion to the effect that the beliefs of Petitioner's church "will not permit him to be inducted." The objection goes to the fact that nowhere in Captain Schuttler's letter is there a description of an "occurrence" to the effect that Petitioner *after* being ordered to do so failed to take the step forward which is, under the regulations, the symbol of induction into the armed forces. The objection goes to the obvious fact that the letter never even mentions that anyone present at the scene described by Captain Schuttler ever ordered him to take the step forward. (App. C, page 31, Government's exhibit B-74).[2]

Petitioner's objection to the admission of Captain Schuttler's letter went further, on the ground that it was a document that was obviously written for the purpose of prosecution and that in consequence, the hearsay rule is not relaxed notwithstanding 28 U.S.C. 1733 (see footnote 2 supra).

The Memorandum for the United States on pages 7 to 10 states that since the Appeal Board acts *de novo* and in consequence "whether the local Board applied proper standards is, therefore, immaterial . . ." In support of this contention various cases are cited. How-

[2] The Court's attention is called to a well reasoned article entitled, "Official Records and Business Entries" by Donald E. Selby, appearing in the Military Law Review, Department of the Army Pamphlet 27-100-11, January, 1961, pages 41, et ff., in which it is shown that the Federal Courts are not in agreement, but to the contrary, leave the matter in a confused state as to the interpretation of 28 U.S.C. 1733.

ever, Petitioner restates his argument set forth in his original Petition that there are cases to the contrary and that therefore, this Court ought to grant a writ of certiorari so that this issue may be resolved.

The United States Court of Appeals for the Ninth Circuit in the case of *Joe Ronald Kretchet* v. *United States*, (decided on December 1, 1960, and published on February 13, 1961), 284 F2d 561, considers the self-same issue and reaches a conclusion contrary to the cases cited by the Memorandum of the United States on pages 7 and 8. In that case the Ninth Circuit Court of Appeals said on page 565:

> "We are unable to determine from the record whether the board, in refusing to sustain appellant's claim for exemption, did so because of appellant's lack of sincerity, or because it believed that appellant's conscientious objections were not based upon religious training and belief, or because appellant was not opposed to war in any form, or whether such action was based upon all three grounds, or on two of them. The advice given by the Department of Justice to the Appeal Board that it could refuse to sustain appellant's claim for exemption on the ground that he was not opposed to war in any form, in our view, was clearly erroneous and fatally infected the adverse recommendation of the Department of Justice."

Petitioner submits that as in the *Kretchet* case, so here the advice of the Department of Justice was clearly erroneous and "fatally infected the adverse recommendation."

The Memorandum for the United States is clearly in error when it states on page 8 that there was a factual basis for the denial of Petitioner's claim as objecting to all military services because "Government exhibits B-10

and B-55, which were in the Petitioner's selective service file indicated that he had worked for a number of years for 'Community Industries', a 'factory' run by the Harshmanite Church, which manufactured under Government contract various items used by the armed forces (*i.e.*, candy for army rations, tents, Wac uniforms, and naval compressors)". The Memorandum is in error because *the Community Industries is not a factory run by the Harshmanite Church* but as the record, and particularly Government exhibit B-10 (App. C) clearly discloses this factory was established by some people, who are members of the Harshmanite Church, so that church members and others may have employment when their community, during World War I, refused to employ members of this church because they were opposed to war. The Memorandum is further in error because this factory did not manufacure "candy for army rations" but simply manufactured candy, some of which may have been purchased and put into army rations. The Memorandum is in error because the exhibits mentioned show that this factory manufactured nurse's uniforms, though it is possible that when the Government purchased such uniforms it may have assigned them to Wacs, Waves or to Lady Marines. The Memorandum is, we submit, maliciously erroneous when it claims that this factory manufactured "naval compressors". The only reference we could find even approximating the device referred to, appears in the Department of Justice's recommendation of November 16, 1956, (Government exhibit B-55, App. C, page 3). There the assistant Attorney General describes the setup of the Community Industries as composed of three divisions "consisting of the candy factory, a division dedicated to the manufacture of dresses, uniforms, tents and other cloth items, and the metal fabricating division known as George Garden Tractor divi-

sion. Items manufactured for the armed forces have included tents, Wac uniforms and some sort of pump or compressor used on naval vessels, and other items."

While Petitioner submits that under the present economic setup there is no employment (not even that of the minister of the gospel) which had not been used for military purposes, however, to make out of "some sort of pump or compressor used on naval vessels" a "naval compressor" is a malicious misstatement of the facts, and is just as much justified as if the Memorandum would have suggested that the Community Industries are equipping the Polaris submarines or the Missile Base in Florida where, for all we know, "some sort of pump or compressor" is also being used.

The Memorandum is in error because the cases cited by it on pages 8 and 9 are in conflict with cases decided by other Circuits, as cited by our original Brief, and particularly is in conflict with the decision of the United States Court of Appeals for the Seventh Circuit, *United States* v. *Wilson,* 215 F2d 443 as well as the decision of this Court in *Estep* v. *United States,* 327 U.S. 114, 66 S.Ct. 423 and other cases cited.

On page 10 the Memorandum for the United States again makes the error of claiming that the church to which Petitioner belongs "operated a factory which engaged in defense production work". Petitioner restates that his church operated no factory whatsoever, and furthermore that *it is his conscience and not that of the church that was, or ought* to have been, before the Draft Board, the Appeal Board, the Department of Justice, and the Courts.

The Memorandum for the United States is further in error when it argues that the trial Court's calling "for

the 'Appeal Board's letter' ", took the place of the Court's searching the record for factual basis of the classification. Petitioner submits that the Appeal Board's letter (App. C, Government's exhibit B-59, page 30) had no place in the record because it was obviously prepared for the purpose of the prosecution and for the purpose of supplying, if it can, the missing factual basis for the classification, and that his timely objections should have been sustained thereto. (footnote 2 *supra*)

On page 10, the Memorandum of the Government states that this Petitioner on pages 20-21 of his original Petition contends that "the instructions from the Appeal Board on May 10, 1955, to the local Board to reprocess the Petitioner's case were disregarded by the local Board. . . ." Petitioner did not, and could not have referred to the instruction of the Appeal Board on May 10, 1955, because such instructions came not from the Appeal Board but from the Illinois Selective Service Director's Office.

The Memorandum forwards a contention which is an error in law, when it claims "that the proceedings before the local board are immaterial in the present posture of the case since Petitioner's classification was given him following *de novo* consideration and classification by the Appeal Board" (page 10 and 11). Petitioner contends that this interpretation is erroneous as a matter of law on the basis of *Mintz* v. *Howlett*, 207 F.2d 758, 762 and cases therein cited. See also, *Nugent* v. *United States*, 346 U.S. 1, 73 S. Ct. 991.

Petitioner further submits that because of the conflict in the various circuits, this Court ought to clarify the issues by granting a writ of certiorari and upon hearing the case, give its decision.

The Memorandum for the United States confesses that "there was no compliance at all" with Rule 32(a), F.R.

Crim. P." and it suggested that "in view of this Court's ruling in *Green* v. *United States*, No. 70, decided February 27, 1961, Petitioner should be resentenced."[3] The respondent also suggested that "Petition for writ of certiorari should be granted and the cause remanded to the District Court for resentencing."

While Petitioner believes that the rules should apply in all cases, nevertheless, he respectfully distinguishes his case involving his religious training and beliefs from that of *Green* in the above cited case. Green was convicted for 1) entering a bank with intent to commit a felony, 2) robbing the bank and 3) assaulting or putting in jeopardy the lives of persons by use of a dangerous weapon while committing the robbery. Green's indictment and conviction occurred in 1952, and he filed case No. 70 before this Court based solely on his claim of violation of Rule 32(a) F.R. Crim. P. Petitioner here contended that the "DRAFT BOARD's ORDER ISSUED IN DISREGARD OF REGULATIONS IS VOID" (Petition Pgs. 20-21) He contended a lack of due process, therefore. That "THE DRAFT BOARD'S ACTION IS NOT CURED BY THE SO-CALLED DE NOVO ACT OF THE APPEAL BOARD" (Petition pages 21 to 23). He also contended that (Petition, pages 23 to 26) "A SELF SERVING STATEMENT BY THE ILLINOIS APPEAL BOARD GIVING NO REASONS OR EXPLANATIONS CANNOT AND DOES NOT TAKE THE PLACE OF BASIS IN FACT THAT IS REQUIRED BY THE HOLDING OF THIS COURT". Petitioner contended that (Pet. pages 26-27) "THE FAILURE AND THE REFUSAL OF THE TRIAL JUDGE TO SEARCH THE RECORD FOR BASIS IN FACT IS A COMPELLING REASON TO GRANT A WRIT OF CERTIORARI" and he also contended that (No. 506, Pet. pgs. 27 and 28)

[3] 81 S. Ct. 653.

"THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN ITS OPINION, POINTED TO NO BASIS IN FACT FOR THE DRAFT BOARD OR APPEAL BOARD'S ACTION, AND THEREFORE THERE IS A CONFLICT WITH OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT", and last but not least, he contended that lack of due process requires the granting of a writ of certiorari and only as an addition to the above weighty, statutory and constitutional issues did he claim the violation of 32(a) F.R. Crim. P. (Pet. pgs. 29 and 30).

Petitioner submits that the granting of the writ of certiorari narrowly limited as suggested by the Memorandum for the United States, will leave all the issues raised by the original Petition unanswered. Petitioner believes that the rules and the law pertaining to due process requires that a full hearing be held upon the granting of an unlimited writ of certiorari, since the violation of the due process is just as compelling as is the violation of 32(a) F.R. Crim. P. in compelling of a partial grant, by the admission of the Memorandum for the United States.

CONCLUSION.

Petitioner submits that there are weighty, statutory and constitutional issues involved in his case and that therefore, the writ of certiorari ought to be granted.

Respectfully submitted,

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March 17, 1961

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IN THE

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OCTOBER TERM, A. D. 1960.

No. 705

DONALD PETER VAN HOOK,

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UNITED STATES OF AMERICA,

Respondent.

MOTION FOR CLARIFICATION AND TO SETTLE THE ORDER.

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 705

DONALD PETER VAN HOOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR CLARIFICATION AND TO SETTLE THE ORDER.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes, Donald Peter Van Hook, petitioner herein, by his attorneys, Francis Heisler and Mark L. Schwartzman, and moves the Court to clarify its order of March 27, 1961, in this case.

Petitioner submits that the granting of a writ of certiorari for the sole purpose of remanding the case for resentencing in compliance with Rule 32 of the Federal Rules of Criminal Procedure has left all the issues raised by the original Petition unanswered.

In the instant case the petitioner set forth eight reasons for the granting of the writ of certiorari all of which in-

volved weighty, statutory and constitutional issues and that this Court should clarify its order to inform the petitioner if any disposition has been made of the other issues, or if no such disposition has been made or considered that the petitioner is not precluded from further redress to this Court for consideration of the unanswered issues after proper sentencing.

Respectfully submitted,

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